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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Ellis lee,

Petitioner

v.

Direct Automotive, Inc.,

Respondents

On Petition for a Writ of Certiorari to the
Appellate Court for the State of Illinois

PETITION FOR WRIT OF CERTIORARI

Ellis Lee
700 West Bittersweet Place, 208
Chicago, Illinois 60613
(773) 883-4450

Petitioner Pro-se

5788

OUESTIONS PRESENTED

1. Whether the Defendant is entitled to a new trial on the specific issue of damages only, where, as here, the defendant did not request, at any time, either prior to, or during the trial, that the trial court split the issues of liability and damages.

2. Whether the defendant is entitled to a new trial on the specific issue of damages only, where, as here, the defendant did not request a new trial on the specific issue of damages only, in the trial court, or in the Appellate Court.

3. Whether the defendant is entitled to a new trial on the specific issue of damages only, where, as here, the defendant did not request a remittitur in the trial court, or in the Appellate Court.

4. Whether the defendant is entitled to a new trial on the specific issue of damages only, where, as here, the defendant's failure to request a remittitur in the trial court, effectively precluded the plaintiff-petitioner from having an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial.

5. Whether the Appellate Court's decision to grant the defendant a new trial on the specific issue of damages only is inconsistent with its decision in the case of Baker v. Spaulding, 228 North Eastern Reporter 2ND Series, page 100, wherein, it ruled that the following three preconditions for a new trial (on damages) must be met:

First, the Defendants must request a remittitur in a Post-Trial Motion. Secondly, the defendants must request a new trial on the specific issue of damages only, in a Post-Trial Motion. Thirdly, where the court finds that there should be a remittitur or a new trial on the specific issue of damages only, the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial on the issue of damages; and, where, as here, neither of the first two conditions were met by the defendant.

6. Whether the Defendant is entitled to a new trial on the specific issue of damages only, where, as here, the trial court did not find that there should be a remittitur, or an allowance of the herein above stated third condition, or a new trial on the specific issue of damages only, and where, as here, the Appellate Court ruled that the trial court did not commit judicial error.

LIST OF ALL PARTIES BELOW

The parties to this proceeding in the court below were Ellis Lee, Plaintiff and Direct Automotive, Incorporated, Defendant.

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The Appellate Court's opinion is not reported but it is reproduced at Appendix A (App. 1). The Appellate Court's denial of Petitioner's petition for rehearing App. B (App.16), is unreported. The trial court's order is App. C (App. 18), and is unreported. In addition, the order of the Supreme Court of Illinois' is unreported, and is App. D. (App. 20). In addition, the Appellate Court's decision in the controlling case of Baker v. Spaulding is reported at 228 North Eastern Reporter, 2nd Series, page 100, and is App E. (24) Finally, Direct Automotive, Inc.'s ("DAI") post-trial motion and notice of appeal is included as App. F. (27), Denial of post-trail motion App. G. (32).

JURISDICTION

The Appellate Court issued its opinion on December 30, 1997, and denied the Petitioner's petition for rehearing on March 19, 1998. In addition, the Supreme Court of Illinois denied the Petitioner's petition for leave to appeal on October 6, 1998. This Petition is being filed within 90 days of the denial of the petition for rehearing, as required by S. Ct. R. 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a). This Petition is not a cross-petition, and Petitioner does not rely on S. Ct. R. 12.5.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1257(a). , S.Ct. R. 10(a), S.Ct. R. 12.5, S.Ct. R. 13.1, and S.Ct. R. 13.3,

STATEMENT OF THE CASE

PROPERTY DAMAGE

This is a property damage case where the defendant, Direct Automotive, Inc. ("DAI") and the plaintiff, Ellis Lee had an implied oral contract for the defendant to complete heater repairs to the plaintiff's limousine, under a factory warranty, as a factory authorized warranty repair facility. DAI did not request to split the issues of liability and damages, either prior to, or during the trial. DAI was found liable by a trial court jury; of which, awarded $11, 264.88 to the Plaintiff on August 23, 1996. App. C. (18). In addition, the defendant did not request a new trial on the specific issue of damages only in his only Post-Trial Motion filed on September 13, 1996 . App. F. (27), And, in said Post-Trial Motion, the defendant did not request a remittitur. Therefore, the defendant did not give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial. The defendant totally denied liability and rolled the dice.

I. THE BAKER V. SPAULDING DECISION

Before Direct Automotive, Inc. ever damaged Plaintiff, Ellis Lee's property, the Appellate Court of Illinois, in a decision in the case of Ardella Baker v. Spaulding Women's Apparel, Inc. 228 North Eastern Reporter, 2nd Series, page 100, ruled on May 9, 1967 that the following three preconditions for a new trial (on damages) must be met:

First, the Defendants must request a remittitur in a Post-Trial Motion. Secondly, the defendants must request a new trial on the specific issue of damages only, in a Post-Trial Motion. Thirdly, where the court finds that there should be a remittitur or a new trial on the specific issue of damages only, the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial on the issue of damage. However, in the instant case, neither of the first two conditions were met by the defendant.

In addition, in the instant case, the trial court's decision to deny DAI's post-trial motion for judgment notwithstanding the verdict, in the alternative, a new trial, App. C.(18), indicates that the court found that the third condition was not met.

II. THE COMPLAINT

On July 1, 1994, the Plaintiff filed an amended complaint (C000022) alleging Breach of Contract in Count I and Negligence in Count II. Thereafter, on August 3, 1994, DAI filed a Motion to Vacate any and all defaults, technical, or otherwise, and for leave to file its Appearance and Jury Demand and Responsive Pleadings, Instanter. (C000045). On August 10, 1994, the trial court granted DAI's Motion to Vacate its Default and granted DAI leave to file its answer and affirmative defenses, or other responsive pleadings, instanter (C000047). On July 10, 1995, DAI filed a Motion to Bar Rejection of Arbitration Award

(C000210). And on July 12, 1995, Plaintiff filed a Motion for Leave to Reject Arbitration Award (C000217). Thus, on August 11, 1995, the trial court granted the Plaintiff's Motion and denied the motion of the defendant, DAI (C000226). During the jury instruction conference, the trial court dismissed plaintiff's negligence claim. The case went to trial before a jury on August 20, 1996.

III. THE TRIAL COURT JURY'S VERDICT.

On August 20, 1996, the trial court jury rendered a verdict in favor of Plaintiff, Ellis Lee, and against Defendant, Direct Automotive, Inc., in the amount of $11,264.88. App. C.(18).

A. THE TRIAL COURT'S RULING AND ENTRY OF JUDGMENT ON THE VERDICT.

After the verdict of the jury on August 23, 1996, the Plaintiff moved immediately for the entry of judgment on the verdict. The defendant objected to the entry of judgment on the verdict. Therefore, the Court set a briefing schedule on the motion and objection, as well as a hearing regarding the same for September 13, 1996. However, one of the defendant's counsels notified the court by letter dated September 4, 1996 that, defendant withdraws its objection to entry of judgment on the verdict.

B. THE DEFENDANTS POST-TRIAL MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, IN THE ALTERNATIVE, A NEW TRIAL.

On September 13, 1996, the defendant, DAI filed a Post-Trial Motion for Judgment Notwithstanding the Verdict, in the Alternative, a New Trial. App. F. (27). This is the only post-trial motion that the defendant filed. Thus, the defendant did not file a Post-Trial Motion for a New Trial on the specific issue of damages only. Similarly, in the case of Dineen v. City of Chicago, 531 N.E. 2nd 347, Appellants waived arguments for purposes of proceedings in the Supreme Court, where they failed to raise argument in courts below, and did not raise argument in their petition for leave to appeal, waiting until their initial brief to assert argument, which represented an alternate theory of the case. Therefore, in the instant case, Defendant, DAI, like Dineen cited herein above, waived arguments for purposes of proceedings in the Appellate Court, where, as here, they failed to raise argument in the trial court below.

C. THE TRIAL COURT'S RULING AND DENIAL OF THE DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, A NEW TRIAL.

On October 8, 1996 the trial court entered its ruling on DAI's post-trial motion. At that time, the court denied the defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial. App. G. (32),

IV. THE APPELLATE COURT'S RULING

A. The Affirmance of the trial court's ruling of liability against Direct Automotive, Inc. ("DAI").

The Appellate Court affirmed the judgment of liability, reversed in part, and remanded with instructions to grant a new trial on the specific issue of damages only, for DAI. App. A. (1). In its ruling, the Appellate Court held that, " although the jury is entitled to substantial deference in its determination of damages, the plaintiff did not use the accepted method of calculating lost profits, and therefore the award in this case bore no reasonable relationship to the loss of net profits during eight days (of loss of use of business property).

B. The Appellate Court's ruling that the trial court did not commit judicial error.

The defendant, DAI made every allegation of judicial error in the book.

First, over defendant's objections, during the jury instruction conference, the trial court modified the proposed instructions to state that plaintiff and defendant had an implied oral contract for defendant to complete the heater repairs. The instructions further stated that the contract included an implied promise that defendant would not damage plaintiff's limousine in the process. The trial court then dismissed plaintiff's negligence claim.

Next, the trial court denied defendant's request for a jury instruction that the jury could find that defendant did not enter into a contract to pay plaintiff's lost profits. The defendant again objected to the use of the word "oral" in the jury instructions, stating that plaintiff never pleaded or proved the existence of an oral contract. The trial court overruled the objection, stating that the description was accurate because an implied contract may be created through acts and conduct. In addition, the trial court denied defendant's request for a jury instruction that the jury could find that defendant did not enter into a contract to pay plaintiff's lost profits.

Finally, the Appellate Court ruled that, defendant, DAI also argues that the trial court made several reversible errors. According to the defendant, the trial court erred in drafting misleading jury instructions in plaintiff's favor and in denying defendant's request for jury instructions stating that the parties entered into a contract for defendant to pay plaintiff's lost profits. However, the Appellate Court ruled that " we disagree ". App. A. (1).

REASONS FOR GRANTING THE WRIT

This case presents important issues of civil procedure, the right to an affirmance of a jury's award, in the absence of judicial or trial court error, and the principle of waiver of issue. By their failure to

initially request a remittitur in the trial court, and their failure to initially request a new trial on the specific issue of damages only, in the trial court, the defendants waived their right to raise this issue in the Appellate Court. Therefore, this court should grant the writ in order to establish supervisory authority and jurisdiction over the herein-described decisions of waiver of issues by the defendants. And the right to an affirmance of a judgment in light of waiver of issues by DAI.

I. THE APPELLATE COURT ERRED IN ORDERING A NEW TRIAL ON THE SPECIFIC ISSUE OF DAMAGES ONLY FOR DIRECT AUTOMOTIVE, INC. ("DAI "). BECAUSE DAI DID NOT REQUEST A NEW TRIAL ON THE SPECIFIC ISSUE OF DAMAGES ONLY, IN THEIR ONLY POST-TRIAL MOTION. App. F. (27).

The Appellate Court ordered the trial court to grant a new trial on the specific issue of damages only for DAI despite the fact that the court conceded that, " in the present case, with regard to defendant's liability for breach of contract, we do not find that the trial court erred in denying defendant's motion for jnov, or for a new trial ". App. A. (1).

> In addition, because the defendant did not request a remittitur, these issues are waived. Thus, the Plaintiff seeks to uphold his right, to receipt and possession of damages properly awarded by a jury of his peers.

A. The Appellate Court Erred In Holding , in its ruling Ordering a new trial on the specific issue of damages only for DAI, because the jury instructions were proper. App. A. (1).

DAI did not request to split the issues of liability and damages in the trial court. Thus the Appellate Court ruled that, " in this case, the jury instructions were proper because they correctly informed the jury of plaintiff's allegation that the parties entered into an implied oral contract for defendant to repair plaintiff's limousine heater with an implied promise not to damage the limousine. Defendant's proposed instruction regarding the implied contract for defendant to pay plaintiff's lost profits was incorrect, and the trial court properly denied it ". App. A(1).

B. The Appellate Court Erred in Holding, in its ruling Ordering a new trial on the specific issue of damages only for DAI, because the trial court did not abuse its discretion in allowing plaintiff to amend his complaint; and in allowing the defendant to file an Affirmative Defense.

The Appellate Court ruled, " in the case sub judice, the trial court did not abuse its discretion in allowing plaintiff to amend his complaint. As the court noted, the amendments properly reflected what plaintiff had included in his original complaint, and they should not have surprised the defendant. The amendments cured the original complaint by properly stating a cause of action for breach of contract. In addition, the amendments

were made during the pre-trial conference and were not untimely . The trial court properly allowed plaintiff to fully present his cause of action, just as it properly allowed defendant to file an affirmative defense ". App.A. (1).

C. The Appellate Court Erred in Holding, in its ruling Ordering a new trial on the specific issue of damages only for DAI, because the trial court did not abuse its discretion in allowing plaintiff to amend his complaint; and in allowing the Plaintiff's Exhibit " F" into evidence. App. A(1).

Defendant, DAI further asserts that the trial court abused its discretion in allowing plaintiff's Exhibit "F" into evidence. According to defendant, he was prejudiced when the trial court " reopened " the case to allow the exhibit into evidence. The Appellate Court ruled that, " We disagree. The trial court noted that it was not reopening the case, but rather had reserved its ruling on whether to allow the exhibit into evidence. Furthermore, the exhibit merely summarized plaintiff' trial testimony, and did not present any new evidence. "App. A(1).

D. The Appellate Court Erred in Holding, in its ruling Ordering a new trial on the specific issue of damages only for DAI, because the trial court did not commit reversible error by interrupting defendant's counsel during closing arguments.

The Appellate Court ruled that, " after defendant's counsel argued to the jury that it would have to decide if there was a contract to pay lost profits, the trial court stopped him, stating that his argument bordered on a

misstatement of law. Again, we disagree with defendant and find that he suffered no prejudice. Defendant was incorrect in characterizing the contract as one to pay lost profits. Moreover, after the trial court interrupted defendant's counsel, it allowed him to complete his closing arguments ". App. A. (1).

E. The Appellate Court Erred in Holding, in its ruling Ordering a new trial on the specific issue of damages only for DAI, because the trial court did not error by amending the jury instructions after defendant's counsel presented closing arguments.

Defendant's final argument is that the trial court erred by amending the jury instructions after defendant's counsel presented closing arguments. The Appellate Court ruled that, "we disagree". "The trial court noted that it had read the proper instructions to the jury, but had corrected a typographical error on the written instructions before the jury saw them."

II. THE APPELLATE COURT ERRED IN ORDERING A NEW TRIAL ON THE SPECIFIC ISSUE OF DAMAGES ONLY FOR DIRECT AUTOMOTIVE, INC. ("DAI") BECAUSE ITS ORDER IS INCONSISTENT WITH ITS RULING IN ITS DECISION IN BAKER V. SPAULDING, 228 NORTH EASTERN REPORTER, 2ND SERIES, P. 100.

THE BAKER V. SPAULDING DECISION

The Appellate Court ruled on May 9, 1967, that the following three preconditions for a new trial (on damages) must be met:

First, the Defendants must request a remittitur in a Post-Trial Motion. Secondly, the defendants must request a new trial on the specific issue of

damages only, in a Post-Trial Motion. Thirdly, where the court finds that there should be a remittitur or a new trial on the specific issue of damages only, the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial on the issue of damage.

However, in the instant case, neither of the first two conditions were met by the defendant.

In addition, in the instant case, the trial court's decision to deny DAI's post-trial motion for judgment notwithstanding the verdict, in the alternative, a new trial, App. C., (18) indicates that the court found that the third condition was not met.

In addition, the Appellate Court ruled that, " the trial judge erred in substituting his judgment for that of the jury ". Therefore, in the instant case, the Appellate Court erred in substituting its judgment for that of the jury when they ruled that DAI should receive a new trial on the specific issue of damages.

Finally, in Baker, supra, the court ruled that, "where the court finds that there should be a remittitur or a new trial the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in a new trial."

However, in the instant case, the Appellate Court has found that there should be a new trial. Yet,

they have failed to provide the plaintiff with an opportunity to accept a remittitur with the knowledge that a refusal to accept may result in a new trial.

III. THE SUPREME COURT OF ILLINOIS ERRED IN DENYING THE PLAINTIFF-PETITIONER'S PETITION FOR LEAVE TO APPEAL.

The Supreme Court of Illinois erred in denying the Plaintiff-Petitioner's Petition for Leave to Appeal because the decision of the Appellate Court in the instant case, is in conflict with the Appellate Court's decision in the case of Baker v. Spaulding 228 N.E. 2ND P. 100., where the court found that, "" where the court finds that there should be a remittitur or a new trial the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in a new trial. Yet, in the instant case, the plaintiff was given no such opportunity.

Wherefore, for all of the herein above stated reasons, the Plaintiff-Petitioner, Ellis Lee, respectfully prays that this Honorable Court will grant his Petition, and reverse the decision of the Appellate Court granting the Defendant, Direct Automotive, Inc., a new trial on the specific issue of damages only, and affirm the decision of the trial court judgment in the amount of $11, 264.88 plus post-judgment interest, and costs, in the alternative, provide me with an opportunity to accept a remittitur with the knowledge that a refusal to accept may result in a new trial.

Respectfully Submitted,

Ellis Lee
700 West Bittersweet Place #208
Chicago, Illinois 60613
(773) 883-4450
Counsel for Petitioner-Pro-Se

APPENDIX A

Second Division
December 30, 1997

NOTICE
The text of this order may be changed or corrected prior to the time for filing of Petition for Rehearing or the disposition of the same.

No. 1-96-3543

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELLIS LEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 94-M1-13316
	)	
DIRECT AUTOMOTIVE, INC.,	)	Honorable
	)	Susan McDunn,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Plaintiff, Ellis Lee, brought this pro se action against defendant, Direct Automotive, Inc., for breach of contract and negligence in the circuit court of Cook County. The trial court later dismissed the negligence count. After trial proceedings the jury found in favor of plaintiff, awarding him $11,264.88 in damages.

Defendant then filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The trial court denied defendant's motion, and entered judgment for plaintiff. Defendant appeals the judgment pursuant to Supreme Court Rule 301, (155 Ill. 2d R. 301).

For the reasons which follow, we affirm in part, reverse in part, and remand this cause with directions.

Plaintiff, who owns a limousine service, brought his limousine to defendant's auto repair shop on October 22, 1993, to have the heater repaired. While repairing the heater, defendant accidentally put a two-inch scratch on the front passenger door. Defendant offered to repair the door for free, or to pay for the repairs done by another auto shop. Plaintiff brought the limousine to A- Carr Auto, which kept it for eight days and repaired the door. A- Carr Auto sent defendant the bill for the services, which totalled $348.43. Defendant paid A – Carr Auto the full amount.

Plaintiff's original complaint alleged negligence and breach of contract. In the breach of contract count, plaintiff alleged that defendant "impliedly represented that it would act with a duty of care in the protection of property of its customer, " and that defendant's breach was the proximate cause of plaintiff's damages. The facts in the complaint stated that defendant damaged plaintiff's limousine while defendant was repairing it. During a pre-trail conference, the court allowed plaintiff to amend his

complaint to allege that there was an implied oral contract for defendant to repair the heater, which included defendant's implied promise not to damage the limousine. The trial court noted that defendant should not have been surprised by the amendment because plaintiff's facts reflected the oral contract. Defendant objected, stating that even as amended, the complaint failed to state a breach of contract cause of action.

At trial, the plaintiff testified that he and defendant "entered into a verbal implied-in-fact contract to have the heater repaired." In support of his allegation of $11,264.88 in damages, plaintiff offered into evidence a photocopy of business cards from "numerous Fortune 500 presidents and vice presidents of companies." Plaintiff used the business cards to market his limousine service to clients after the limousine was repaired. Over defendant's objection, the trial court admitted the photocopy into evidence. According to plaintiff, he attempted to mitigate his damages by asking the City of Chicago Department of Consumer Services the requirements for obtaining a temporary replacement limousine. Plaintiff and witnesses from the department testified that the department's rules required several documents for a request to change the limousine. The documents included the vehicle's title or manufacturer's certificate or origin; a city sticker; a livery license card; and a certificate of insurance. Furthermore, the rules stated that a request for a limousine change must have been made at least five days before a scheduled inspection. According to

Plaintiff, the rules made obtaining a temporary replacement limousine impractical.

In addition, plaintiff testified that he earned $76,500 in 1991, $87,314 in 1992, $88,158 in 1993, and $118,276 in 1994. During several months before and after October 1993, plaintiff earned between $400 and $700 per day. Plaintiff's claimed damages included $400 per day for eight days, for a total of $3,200. Also, plaintiff testified that he worked 14 hours per day, receiving an average of 3 business phone calls per hour, or 42 calls each day. During eight days, plaintiff received an average of 336 calls. According to plaintiff, 5 percent of those calls, or 17, would have reserved the limousine for an 8-hour period at $60 per hour, or $480. Plaintiff calculated that 17 calls for $480 worth of limousine services totalled $8,064. [1] Therefore, plaintiff's claimed damages were $11,264.88m, including related postage costs. On cross-examination, defendant's counsel asked plaintiff what the basis for the 5 percent figure was. Plaintiff responded, "The basis is that it's not scientific. ***I acquired the number of calls, I logged them in, and I recorded the number of people who inquired of using my service for an eight-hour period during those eight days, and it was 17 people." According to plaintiff, he did not write down the name of each caller and the time of each call during those eight days. Plaintiff also confirmed that he was seeking his lost profits for the eight days, and that the $88,158 he earned in 1993 constituted the gross receipts for the business. In 1993, plaintiff's net business income was approximately $6,830.

Plaintiff's girlfriend testified that she helped plaintiff with his business and that during the time after October 22, 1993, she observed plaintiff receiving phone calls and telling clients that his service was not available.

During the jury instruction conference, the trial court modified the proposed instructions, over defendant's objections, to state that plaintiff and defendant had an implied oral contract for defendant to complete the heater repairs. The instructions further stated that the contract included an implied promise that defendant would not damage plaintiff's limousine in the process. The trial court then dismissed plaintiff's negligence claim. Defendant again objected to the use of the word "oral" in the jury instructions, stating that plaintiff never pleaded or proved the existence of an oral contract. The trial court overruled the objection, stating that the description was accurate because an implied contract may be created through acts and conduct. In addition, the trial court denied defendant's requ4est for a jury instruction that the jury could find that defendant did not enter into a contract to pay plaintiff's lost profits.

The trial court then stated that it had given defendant leave to file affirmative defenses, and it wanted then in writing. It also instructed plaintiff to amend his complaint to match the jury instructions. Defendant objected to the court "drafting pleadings." The trial court stated that it granted plaintiff leave to amend the complaint before the parties presented the evidence, and that it was writing what it would allow

plaintiff to include in the amended complaint. Defendant's counsel then asked permission to leave, and the trial court stated that it would not require him to leave or remain, but that it would continue to conference with plaintiff. After defendant's counsel left, the trial court instructed plaintiff on which language to include in the amended complaint. Plaintiff later filed the amended complaint on the day of closing arguments.

Before the closing, plaintiff offered into evidence Exhibit "F," which summarized his alleged damages and his calculations for those damages. Over defendant's objection, the trial court allowed plaintiff to use the exhibit as demonstrative evidence of his trial testimony, because it found that he exhibit reflected plaintiff's trial testimony. The trial court point out that plaintiff offered it during the pre-trial conference, and that it had reserved its ruling on whether to allow it.

During closing arguments, defendant's counsel argued in part that plaintiff contended that "this hidden and implied term in this oral contract was if you scratch my car, then you, [defendant], you have to pay me my lost business profits while the car is being repaired by somebody else.*** You are not going to make a decision here by making up conversations and imagining terms that didn't exist. Your job as referees [is] to decide was there such a contract to pay lost profits or not. That's it." The trial court then stopped defendant's counsel, stating that what he argued bordered on a misstatement of law. It emphasized that the issue was whether there was

an implied contract, and that the jury was not limited only to the parties' oral discussion.

After closing arguments, the trial court read the instructions to the jury. It then informed plaintiff and defendant's counsel that although the instructions, as read to the jury, correctly stated that the contract included an "implied promise" not to damage the limousine, the written instructions stated that there was an "implied oral promise." The trial court noted that it deleted, as a typographical error, the work "oral" from that phrase in the written jury instructions, because it was never used in the phrase during the jury instruction conference. Defendant's counsel then objected, stating that he made his closing arguments based in part on the phrase "implied oral promise." However, the trial court stated that it and the parties never agreed that the implied promise was oral, and that the typographical error would not affect the outcome of the case. The jury returned a verdict in favor of plaintiff for $11,264.88. The trial court denied defendant's motion for judgment notwithstanding the verdict (jnov) or, in the alternative, for a new trial.

On appeal, defendant contends that the trial court erred in denying his notion for jnov, or in the alternative, a new trial. A trial court should grant a motion for jnov, only if the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on that evidence could ever stand. Holton v. Memorial Hospital, 176 Ill. 2d 95, 109 (1997). However, a trial court should set aside the

jury's verdict and grant a new trial only when the verdict is against the manifest weight of the evidence. Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 509-10 (1967); Asplund v. Silica Sand Transport, Inc., 254 Ill. App. 3d 593, 597 (1993). A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the jury's findings are "unreasonable, arbitrary, and not based on the evidence." Maple v. Gustafson, 151 Ill. 2d 445, 454 (1992). We will not reverse a trial court's denial of a motion for a new trial absent a clear abuse of its discretion. Snover v. McGraw, 172 Ill. 2d 438, 449 (1996).

Defendant first argues that plaintiff failed to present any evidence in support of his breach of an implied oral contract claim. According to defendant, plaintiff failed to prove that the parties had an oral implied contract for defendant to pay plaintiff's lost profits while another auto shop repaired plaintiff's limousine.

Implied contracts are created by the law as a result of the parties' acts, and are considered either implied-in-law or implied-in-fact. Zadronzny v. City Colleges of Chicago. 220 Ill. App. 3d 290, 295 (1991). A contract implied-in-law results from a duty imposed by law and is created and governed by equitable principles. Zadronzny, 220 Ill. App. 3d at 295. A jury's determination of whether a party has breached a contract is a question of fact, which we will not disturb on review unless the jury's finding is against manifest weight of the evidence. Borys v. Rudd, 207 Ill, App. 3d 610, 618 (1991).

A party may recover all damages which naturally and generally result from a breach, but where damages are the consequence of special or unusual circumstances, the party must show that they were within the reasonable contemplation of the parties. Midland Hotel v. R.H. Donnelley Corp., 118 Ill. 2d 306, 318-19 (1987). To successfully maintain a lost profits claim, a party must show, with a reasonable degree of certainty, a loss and the wrongfulness of the opposing party's act causing the loss. Agrimerica, Inc. v. Mathes, 199 Ill. App. 3d 435, 452 (1990). The accepted method of proving lost earnings is to calculate the loss profits, with a fair degree of probability or a reasonable degree of certainty. Madigan Brothers, Inc., Melrose Shopping Center Co., 198 Ill. App. 3d 1083, 1090 (1990); S.A. Maxwell Co. v. DeSoto, Inc., 73 Ill, App. 3d 844, 850 (1979). It is within a jury's discretion to determine damages, and its award of damages is entitled to substantial deference. Snover, 172 Ill. 2d at 447. We will not disturb a jury's award of damages "unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no relationship to the loss suffered." Snover, 172 Ill. 2d at 447, quoting Gill v. Foster, 157, Ill. 2d 304, 315 (1993).

In the present case, with regard to defendant's liability for breach of contract, we do not find that the trial court erred in denying defendant's motion for jnov or for a new trial. Defendant incorrectly characterizes plaintiff's action as alleging a breach of an implied contract to pay plaintiff's lost profits.

Plaintiff's pro se amended complaint alleged that the parties entered into an implied oral contract for defendant to repair the limousine heater, and that the contract included an implied promise not to damage the limousine while repairing it. In this action, plaintiff alleged that his lost profits were a result of defendant's breach of the implied oral contract.

At trial, the evidence showed that defendant scratched plaintiff's limousine when the limousine's heater was being repaired. Defendant admitted to damaging the limousine and offered to repair the scratch, or to pay for the repairs done by another auto shop. A-Carr-Auto repaired the scratch over eight days, and defendant paid the bill in full. The evidence supported the jury's determination that the parties had an implied oral contract with an implied promise not to damage plaintiff's limousine, and that defendant breached it by scratching the limousine. We disagree with defendant, and find that the evidence regarding his alleged liability was not overwhelmingly in his favor, and that the jury's finding was not against the manifest weight of the evidence.

However, we find that the trial court abused its discretion in denying defendant's motion for a new trial on damages. In Madigan Brothers, Inc., the plaintiff, a retail store, sued its landlord for breach of contract after the store's roof collapsed from water damage. Madigan Brothers, Inc., 198 Ill. 3d at 1084. The plaintiff claimed lost profits, basing its calculation on the "gross margin" it would have made, and the appellate court found that the "gross

Margin" method was incorrect. Madigan Brothers, Inc., 198 Ill. App. 3d at 1090. The evidence of damages that plaintiff presented in this case was based on his gross business income, rather than his net profit. During 1993, the year in which plaintiff brought the limousine to defendant, the record shows that plaintiff's gross business income was $88,158, but his net business income was approximately $6,830. Plaintiff calculated his daily earnings to be between $400 and $700, according to his gross business income. Although the jury is entitled to substantial deference in its determination of damages, plaintiff did not use the accepted method of calculating lost profits, and therefore the award in this case bore no reasonable relationship to the loss of net profits during eight days.

Defendant also argues that the trial court made several reversible errors. According to defendant, the trial court erred in drafting misleading jury instructions in plaintiff's favor and in denying defendant's request for jury instructions stating that the parties entered into a contract for defendant to pay plaintiff's lost profits. We disagree.

The trial court must, within its discretion, instruct the jury on all issues which were reasonably presented by the evidence. Seitz v. Volger, 289 Ill. App. 3d 1029, 1044 (1997). We will not disturb the trial court's jury instructions determination absent a clear abuse of discretion. Seitz, 289 Ill. App. 3d at 1044. The jury instructions were proper if they, in their entirety, fairly, fully, and comprehensively

informed the jury of the relevant principles. Seitz, 289 Ill. App. 3d at 1044.

In this case, the jury instructions were proper because they correctly informed the jury of plaintiff's allegation that the parties entered into an implied oral contract for defendant to repair plaintiff's limousine heater with an implied promise not to damage the limousine. Defendant's proposed instruction regarding the implied contract for defendant to pay plaintiff's lost profits was incorrect, and the trial properly denied it.

In addition, defendant contends that the trial court prejudiced him by allowing plaintiff to amend his pro se complaint, and by assisting plaintiff with the amendments. Pro se litigants are generally given deference as long as they conform to the rules of procedure and evidence. Yang v. Chen, 283 Ill. App. 3d 80, 84 (1996). The decision of whether to allow amendments to pleadings is within the trial court's sound discretion, and should be liberally allowed to permit the parties to fully present their causes of action. Hobart v. Shin, No. 1-95-3735, slip op. At 4 (Ill. September 15, 1997); Simon v. Wilson, 291 Ill. App. 3d 495, 508 (1997). The factors to consider in determining whether the trial court abused its discretion are:

> "1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the

proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." Simon, 291 Ill, App. 3d at 508.

In the case sub judice, the trial court did not abuse its discretion in allowing plaintiff to amend his complaint. As the court noted, the amendments properly reflected what plaintiff had included in his original complaint, and they should not have surprised defendant. The amendments cured the original complaint by properly stating a cause of action for breach of contract. In addition, the amendments were made during the pre-trial conference and were not untimely. The trial court properly allowed plaintiff to fully present his cause of action, just as it properly allowed defendant to file an affirmative defense.

Defendant further asserts that the trial court abused its discretion in allowing plaintiff's Exhibit "F" into evidence. According to defendant, he was prejudiced when the trial court "reopened" the case to allow the exhibit into evidence. We disagree. The trial court noted that it was not reopening the case, but rather had reserved its ruling on whether to allow the exhibit into evidence. Further more, the exhibit merely summarized plaintiff's trial testimony, and did not present any new evidence.

Also, defendant submits that the trial court committed reversible error by interrupting defendant's counsel during closing arguments. After defendants counsel argued to the jury that it would

have to decide if there was a contract to pay lost profits, the trial court stopped him, stating that his argument bordered on a misstatement of law. Again, we disagree with defendant and find that he suffered no prejudice. Defendant was incorrect in characterizing the contract as one to pay lost profits. Moreover, after the trial court interrupted defendant's counsel, it allowed him to complete his closing arguments.

Defendant's final argument is that the trial court erred by amending the jury instructions after defendant's counsel presented closing arguments. We disagree. The trial court noted that it had read the proper instructions to the jury, but had corrected a typographical error on the written instructions before the jury saw them.

For the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court, in accordance with Supreme Court Rule 23 (b) (166 Ill. 2d R. 23 (b)), and remand this cause to the circuit court for a new trial on the issue of plaintiff's damages only, and for further proceedings consistent with his order.

Affirmed in part, reversed in part; and remanded with directions.

TULLY, J. with MCNULTY, P.J. AND COUSINS, J., concurring.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT - SECOND DIVISION

ELLIS LEE,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 1-96-3543
	)	
DIRECT AUTOMOTIVE, INC.,	)	
	)	
Defendant-Appellant.	)	

ORDER

This cause coming to be heard on Plaintiff-Appellee's Petition for Rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

Jill K. McNulty /s/
JILL K. MCNULTY, JUSTICE

John P. Tully /s/
JOHN P. TULLY, JUSTICE

William Cousins, Jr. /s/
WILLIAM COUSINS, JR. JUSTICE

ORDER ENTERED

MAR 19, 1998

PELLATE COURT, FIRST DISTRICT

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY

Judge Susan J. McDunn

SEP 09 1996

Circuit Court - 1620

ELLIS LEE,)
)
v.)
) No. 94 M 1 13316
DIRECT AUTOMOTIVE, INC.,)

ORDER

This matter having come before this court for trial on August 20, 1996; having rendered a verdict in favor of plaintiff Lee, and against Defendant Direct Automotive, in the sum of $11,264.88; and plaintiff having moved for entry of judgment on the verdict immediately after the verdict was rendered on August 23, 1996, of the judgment and the court having set a briefing schedule on the motion and objection and having set a hearing regarding same for September 13, 1996 at 1:00 p.m; and defendant's counsel, Michael Jasper, having notified the court by letter dated September 4, 1996 that defendant withdraws its objection to entry of judgment on the verdict; IT IS HEREBY ORDERED; 1) that judgment on the verdict is entered in favor of Plaintiff, Lee and against Defendant , Direct Automotive for the sum of $11,264.88 plus costs.; and 2) the hearing date of September 13, 1996 at 1:00 p.m. is stricken.

Judge Susan McDunn
September 9, 1996 /s/

APPENDIX D

---------- CASE INITIATION ----------

CASE NUMBER:	85315 STATUS: Z
INITIATION:	04/23/9
SHORT TITLE:	Lee v. Direct Automotive
CIV/PEO:	Civil
RULE:	315
TYPE:	Petition for Leave to Appeal
COUNTY:	Cook
DISTRICT:	1
CIRCUIT:	0
TC NOA:	
PLA FILED:	02/23/98
PLA DUE:	04/23/98
ANSWER FILED:	
ANSWER DUE:	05/07/98
PLA ALLOWED:	
PLA DENIED:	10/06/98
NO PART:	

---------- CONSOLIDATED / RELATED ----------

---------- CASE TITLE ----------

FULL: Ellis Lee,
Petitioner
v.
Direct Automotive, Inc.,
Respondent

ABBREVIATED:	Ellis Lee, petitioner, v. Direct Automotive, Inc., respondent. Leave to appeal, Appellate Court, First District.

---------- CASE NUMBER REFERENCE ----------

COURT:	Appellate Court
REF NUM:	1-96-3543
AC DISP:	Rule 23
AC DISP DATE:	12/30/97
COURT:	Circuit Court
REF NUM:	94M113316
TRIAL JUDGE:	Hon. Susan J. McDunn

---------- ATTORNEY/ PARTY OF RECORD ----------

ATTORNEY:	Mr. Ellis Lee
PRO SE:	Yes
FIRM/TITLE:	
APPEARANCE:	04/24/98
NOTICE:	Yes
FEE STATUS:	Billed
FEE AMOUNT:	$25.00
DATE PAID:	04/29/98
RECEIPT:	168270
PARTY:	Ellis Lee
GRP:	1
GRP SEQ:	1
SC DESG:	Petitioner/Appellant
TC DESG:	0

****

---------- FILINGS ----------
---------- MOTION ORDERS ----------
---------- RECORD EXHIBIT ----------
---------- CALL OF THE DOCKET ----------
---------- DISPOSITION ----------

DISP DATE: 10/06/98
WITHDRAWN:
DISMISSED:
PLA DENIED: Yes
LV TO FILE DENIED:
OPN/ORD: Order
ORDER:
VAULT NUM: 0
MICROFILM: YES
ILL CITE:
NE CITE:

---------- UNITED STATES SUPREME COURT ----------
---------- CASE NOTES----------

APPENDIX E

83 Ill. App. 2d 455

Ardella BAKER, Plaintiff-Appellant,

v.

SPAULDING WOMEN'S APPAREL, INC. HARRY RUBIN AND NETTLE RUBIN,

Defendants-Appellees.

Gen. No. 50800

Appellate Court of Illinois

First District, Second Division

May 9, 1967

Action for compensatory and punitive damages on allegations of false imprisonment and other wrongs. The Circuit Court, Law Division, Cook County, George B. Weiss, J., after jury had returned a verdict against defendants and it had entered judgment thereon, entered a remittitur without the consent of the plaintiff. On appeal the Appellate Court, Burke, J., held that the court had not authority to enter a remittitur with out the consent of the plaintiff.

Judgments reversed and cause remanded with directions.

1. New Trial 162(5)

Where the court finds that there should be a remittitur or a new trial, the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that refusal to accept may result in an order allowing a new trial.

2. New Trial 162(5)

The court had not authority to enter a remittitur without the consent of the plaintiff.

David S. Minor, Chicago, for appellant.

Morgan, Halligan, Lanoff & Cook, Chicago, John A. Cook, Philip L. Bransky, Chicago, of counsel, for appellees.

BURKE, Justice.

In an action for compensatory and punitive damages on allegations of false imprisonment and other wrongs and on issue joined, the jury returned a verdict against the defendants for $5,000 and judgment was entered thereon. On the hearing of the post-trial motion the court, without the consent of plaintiff, entered a remittitur of $4,250, thereby reducing the judgment to $750. The court also vacated the $5,000 judgment but did not otherwise rule on the post-trial motion. Plaintiff appeals.

[1, 2] Plaintiff's first point is that the trial judge erred in substituting his judgment for that of the jury in assessing damages. Where the court finds that there should be a remittitur or a new trial the proper procedure is to give the plaintiff an opportunity to accept the remittitur with the knowledge that a refusal to accept may result in an order allowing a new trial. The court had no authority to enter a remittitur without the consent of the plaintiff. Rasmussen v. National Tea Co., 304 Ill. App. 353, 358, 26 NE 2d 523.

Therefore the judgements for $5,000 and for $750 are reversed and the cause remanded with directions to rule on the post-trial motion and for further proceedings.

Judgments reversed and cause remanded with directions.

LYONS, P.J., and BRYANT, J., concur

APPENDIX F

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

ELLIS LEE, Plaintiff	)	
v.	)	No. 94 M1 13316
DIRECT AUTOMOTIVE, INC., Defendant	)	

FILED

SEP 13 1996

AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

NOTICE OF FILING

TO: Ellis Lee
700 West Bittersweet Place, 208
Chicago, Illinois 60613

PLEASE TAKE NOTICE that on September 13, 1996 there was filed with the Clerk of the Circuit Court, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, IN THE ALTERNATIVE, FOR A NEW TRIAL a copy of which is attached hereto and herewith served upon you.

By: _____
DANIEL G. SUBER

Name: Daniel G. Suber and Associates
Attorney For: Defendant
Address: 77 W. Washington Street, Suite 623
City: Chicago, Illinois 60602
Telephone: (312) 899-1811
Firm I.D. No. 23751

PROOF OF SERVICE BY MAIL

I, Daniel G. Suber, an attorney, certify that I served this notice by mailing a copy to the above named party or parties and depositing the same by faxing from 77 W. Washington St., Chicago, Ill., at 5:00 P.M. on September 13, 1996, with proper postage prepaid.

_____

DANIEL G. SUBER

APPEAL TO THE APPELLATE COURT
FOR THE FIRST JUDICIAL DISTRICT - CHICAGO, ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

ELLIS LEE, Plaintiff	)	
v.	)	No. 94 M1 13316
DIRECT AUTOMOTIVE, INC., Defendant	)	

NOTICE OF APPEAL

TAKE NOTICE HEREBY that the Defendant-Appellant, DIRECT AUTOMOTIVE, INC., by and through its attorneys, Daniel G. Suber & Associates, hereby appeals to the Appellate Court of the State of Illinois, First District, 1) the Court's Order of August 24, 1996 denying Defendant's Motion for a Directed Verdict; 2) the Court's Order of September 9, 1996 entering judgment of the jury's verdict in favor of the Plaintiff in the sum of $11,264.88; 3) the Court's Order of October 8, 1996, denying Defendant's Motion of Judgment Notwithstanding the Verdict; and 4) the Court's Order of October 8, 1996, denying the Defendant's Motion for a New Trial. Defendant-Appellant seeks to have the orders of September 9, 1996 and October 8, 1996 vacated, the judgment in favor of the Plaintiff-Appellee reversed, and this cause remanded for a new trial.

By Daniel G. Suber
DANIEL G. SUBER /s

Name:	Daniel G. Suber and Associates
Attorney For:	Defendant
Address:	77 W. Washington Street, Suite 623
City:	Chicago, Illinois 60602
Telephone:	(312) 899-1811
Firm I.D. No.	23751

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY

ELLIS LEE,	)	
	)	
v.	)	
	)	No. 94 M 1 13316
DIRECT AUTOMOTIVE, INC.,	)	

ORDER

This matter coming before the court pursuant to Defendant's post-trial motion for judgment NOV or, in the alternative, for a new trial and this court being fully advised in the premises.
IT IS HEREBY ORDERED: that Defendants motion is denied.

Atty. No. 23751
Name: Daniel G. Suber and Ass
Attorney For: Defendant
Address: 77 W. Washington Street
City: Chicago, Illinois 60602
Telephone: (312) 899-1811

Judge Susan J. McDunn

OCT – 8 1996

Circuit Court - 1620

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the Appellate Court appears at Appendix A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The date on which the highest court decided my case was October 6, 1998.

A copy of that decision appears at Appendix D.

The date on which the highest state court decided the merits of my case was December 30, 1997.

A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: March 19, 1998.

and a copy of the order denying rehearing appears at Appendix B .

Respectfully Submitted,

Ellis Lee

Ellis Lee
700 West Bittersweet Place #208
Chicago, Illinois 60613
(773) 883-4450
Counsel for Petitioner-Pro-Se